



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 45 OF 2015

M/S MASTER POWER SYSTEMS LIMITED.....APPELLANT

-VERSUS-

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

M/S CENTRAL ELECTRICALS INTERNATIONAL LIMITED.....2ND RESPONDENT

GLAMA ELECTRICAL & MECHANICAL CO. LTD.....3RD RESPONDENT

RULING

- 1) On 30th May 2019, this appeal was placed before this court for mention. On the aforesaid date this court proceeded to dismiss the appeal for want of prosecution at the instance of the respondents' advocate.
- 2) The appellant has now taken out the motion dated 19th June 2019 in which it sought to have the dismissal order reviewed and set aside. The motion is the subject matter of this ruling. It is supported by the affidavit sworn by Kevin Wakwaya. The 2nd respondent filed the replying affidavit sworn by Joseph Cherutoi to oppose the motion. The appellant also filed a supplementary affidavit sworn by Kevin Wakwaya in response to the replying affidavit.
- 3) When the motion came up for interpartes hearing, this court directed learned counsels to file written submissions. At the time of writing this ruling the appellant was the only party which had filed the written submissions.
- 4) I have considered the grounds stated on the face of the motion and the facts deponed in the rival submissions. I have further considered the rival written submissions plus the authorities cited. It is the submission of the appellant that there is an error apparent on record in that this court proceeded to make a substantive order dismissing the appeal during a mention.
- 5) It is also pointed out that the appellant had taken steps to have the appeal listed for hearing in vain. The appellant further pointed out that the 120 days given to the appellant to list the appeal for hearing had not lapsed by the time the appeal was dismissed. For the above reasons, this court was beseeched to review and set aside the dismissal order.
- 6) The respondents on their part urged this court to dismiss the motion arguing that the motion was filed after an inordinate delay which was never explained. It is said that the application was filed as an afterthought.
- 7) Having considered the rival submissions, it is not in dispute that on 5th December 2018, Hon. Mr. Justice Mbogholi, issued an order directing the appellant to cause this appeal to be listed for hearing within 120 days from the date of ruling.
- 8) It is also not in dispute that this appeal was listed for mention on 30.5.2020. The record does not show or indicate the purpose of the mention. The advocates for the appellant requested the court for a further mention date while the advocates appearing for the respondents beseeched this court to dismiss the appeal for want of prosecution on the basis that the appellant had taken no steps to have the appeal listed for hearing.
- 9) With respect, I am persuaded by the appellant's argument that no substantive orders should be made during a mention. In this case the parties appeared before this court and proceeded to make submissions on whether or not the appeal should be dismissed. The record shows that the parties had not consented to allow the court make substantive orders during a mention. It would appear that this court was made to believe that the parties had given their consents to enable this court make substantive orders. It is apparent that no such consent was given. I am convinced that there being no consent order is an error apparent on the face of record. In the circumstances this court is obliged to set

aside such an order.

10) In the end, I find the motion dated 19.6.2020 to be with merits. It is allowed. Consequently, the order dismissing this appeal issued on 30.5.2019 is set aside. The appeal is hereby ordered reinstated. Each party to bear its own costs. Parties are at liberty to apply.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 8th day of January, 2021.

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J. K. SERGON

JUDGE

In the presence of:

.....**for the Appellants**

.....**for the Respondents**